

**Supporting Statement For
Mail, Internet, or Telephone Order Merchandise Rule
16 C.F.R. Part 435
(OMB Control No. 3084-0106)**

(1) Necessity for Collecting the Information

Under authority of the FTC Act, 15 U.S.C. § 41 *et seq.*, the Federal Trade Commission (“FTC” or “Commission”) promulgated the Mail Order Merchandise Trade Regulation Rule, 16 C.F.R. Part 435, the original title of the Rule on October 22, 1975 (40 Fed. Reg. 49,492). The Rule became effective on February 2, 1976 (40 Fed. Reg. at 49,494). In 1993, the Commission amended the Rule under authority of Section 18 of the FTC Act, 15 U.S.C. § 57a, to include sellers (or merchants) who solicited orders for merchandise by telephone (including by telefax or by computer through the use of a modem), and renamed it the Mail or Telephone Order Merchandise Rule. 58 Fed. Reg. 49,096 (September 21, 1993). The amended Rule took effect on March 1, 1994. 58 Fed. Reg. at 49,123. In 2014, Commission amended the Rule, effective December 8, 2014, to clarify that it covers all Internet merchandise orders and permits flexibility in making refunds and refund notices, as well as clarifying refund obligations for non-enumerated payments. 79 Fed. Reg. 55,615 (Sept. 17, 2014). The Rule was also renamed the Mail, Internet, or Telephone Order Merchandise Trade Regulation Rule (“MITOR” or “Rule”).

The MITOR implements Section 5 of the FTC Act, 15 U.S.C. § 45, and is designed to prevent interstate direct marketers from unilaterally changing the shipment time in a merchandise sales contract, a material term. Without the Rule, buyers (or consumers) would be faced with unexplained delays or failures of direct marketers to ship mail, Internet or telephone order merchandise, or failures to provide refunds for unshipped mail, Internet or telephone merchandise.

The MITOR requires sellers to disclose to customers when shipment is delayed and, absent customer consent to delayed shipment, to refund customer payments for unshipped merchandise.¹ The MITOR also requires the seller, without being asked, to cancel the order and make a full and prompt refund whenever: (1) the seller determines that it will never be able to ship the merchandise; (2) the seller fails to provide a required notice of delay within the originally promised shipment time or within any revised shipment time; (3) the buyer exercises any cancellation option before the seller ships; or (4) the seller is unable to ship and the buyer fails to agree to delayed shipment within the time required for expressly agreeing to delay. The

¹ Sellers must seek customer consent for delayed shipment if they cannot ship within the time initially stated or, if not stated, for delays exceeding 30 days after receiving a properly completed order from the buyer or, regarding seller-financed orders, delays beyond 50 days thereafter. 16 C.F.R. § 435.2(a)(1)(i)-(ii).

seller discloses the refund by the reimbursement itself (where the merchandise was paid for originally by cash, check or money order), or by notifying the buyer that any charge to the buyer's charge account will be reversed or that the seller will take no action that will result in a charge.

The MITOR contains no recordkeeping requirements *per se*. It establishes, however, a rebuttable presumption against sellers who lack documentary proof of mechanisms to assure timely shipments. Similarly, absent supportive records, it is presumed that a seller has failed to comply with the Rule's requirements for timely delay option notices and refunds. *See* 16 C.F.R. §§ 435.2(a)(4) and 435.2(d).

Prudent industry members keep records of procedures for: (1) estimating buyer demand for and securing adequate sources of supply for each item of merchandise offered for sale by mail, Internet or telephone; (2) receiving and fulfilling orders; (3) accurately recording information relating to each order; and (4) assuring automated communications with buyers about any changing fulfillment circumstances comply with the notice and refund provisions of the MITOR. Sellers customarily keep such records in the ordinary course of business, however; consequently, their retention of these documents does not constitute a "collection of information" under OMB's regulations that implement the Paperwork Reduction Act ("PRA"). *See* 5 C.F.R. § 1320.3(b)(2).

(2) Use of the Information

The primary purpose of the Rule's disclosure requirements is to provide buyers timely information on the shipment status of their orders, and to afford them the power to consent to any changed shipment time or to rescind the contract and promptly obtain the return of their money. Using this information, buyers can seek alternative sources of the merchandise and make time-effective purchasing decisions. The Rule's rebuttable presumption against sellers who lack documentary proof of mechanisms to assure timely shipments provides grounds for possible Commission enforcement action for non-compliance and incentivizes sellers to maintain systems to demonstrate compliance with the Rule.

(3) Consideration of the Use of Improved Information Technology to Reduce Burden

Apart from notifications concerning "prompt refunds" (16 C.F.R. § 435.1(b)), nothing in the Rule prescribes that disclosures be made, records filed or kept, or signatures executed, on paper or in any particular format that would preclude the use of electronic methods to comply with the Rule's requirements.

Information processing hardware and software can be a part of the "systems and procedures which assure the shipment of merchandise in the ordinary course of business" and ensures compliance with the Rule. Most sellers record inventory and buyer order information in computers programmed to generate packing slips and address labels in time for shipment. For goods that computer systems identify as being on back order, the systems may generate

rule-compliant delay notices or refunds within the times required by the Rule. Additionally, many sellers and fulfillment houses have acquired and integrated with their information processing technology bar code scanner capabilities that provide information in real time on the status of each order, from generating the packing slip to placing the order in the shipper's hands. Thus, computerized records of order receipt and timely shipment or delay notification or refund are the seller's primary evidence of rule compliance.

Under the Commission's rule review program, patterned loosely after the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* ("RFA"), the Commission periodically solicits comments on ways to minimize the recordkeeping burden demonstrating rule compliance through the use of automated collection techniques and other forms of information technology. For example, on September 21, 1993, the Commission, in response to input from the direct marketing industry, eliminated provisions in the MOR that created rebuttable presumptions of non-compliance if the seller used means other than first class mail to provide rule-required delay option notices to buyers. Through the Rule amendment, the Commission facilitated more convenient means to provide required shipping delay notification, such as by telephone, 58 Fed. Reg. 49,096, 49,111-12. As Internet sales have exponentially increased, so too has the use of the Internet by businesses to provide these rule-required notifications to buyers.

(4) Efforts to Identify Duplication

The original version of the Rule has been in effect since February 2, 1976. Since that time, FTC staff have worked closely with the industry. Staff attorneys practicing in this area verify that the disclosure and substantiation requirements of the rule do not duplicate any other requirements.

(5) Efforts to Minimize Burden on Small Organizations

The Rule's disclosure and substantiation requirements are designed to impose minimal burden on affected members of the industry, regardless of size. The Commission's 1986 RFA review of the Rule found that, based on an industry-wide survey of direct marketers, nearly half of all small and large firms surveyed reported no incremental compliance costs and that an additional 27% reported compliance expenditures less than \$500 annually. Among affected entities, 81% of small businesses and 65% of large businesses reported that eliminating the Rule would not alter their business practices because "[m]ost mail order firms, large and small, feel the concept of the [Mail Order] rule is sound business practice that enhances the growth and development of a mail order business and they do not wish to have the Rule eliminated." See 51 Fed. Reg. 1516, 1517 (Jan. 14, 1986). Moreover, in promulgating the 2014 amendments, the Commission found during its related RFA analysis of the then proposed amendments that the amended Rule would not have a significant impact upon a substantial number of small entities. See 79 Fed. Reg. at 55,619.

As part of an ongoing review of its rules, the Commission continues to examine the MITOR to determine, among other things, whether new technology or changes in technology

can be used to reduce regulatory burdens that the Rule may impose.

(6) Consequences of Conducting the Collection Less Frequently

The substantiation requirements of the Rule ensure that buyers are provided reliable shipment information in the seller's solicitation of order sales and in required notifications of delay. The disclosure and refund requirements ensure that buyers are notified of delays and empowered to cancel orders and obtain prompt refunds in delayed shipment situations. Doing less would circumvent the Rule's purpose.

(7) Circumstances Requiring Collection Inconsistent With Guidelines

The collection of information in the Rule is consistent with all applicable guidelines contained in 5 C.F.R. § 1320.5(d)(2).

(8) Consultation Outside the Agency

For this current PRA clearance request, the FTC sought public comment on the Rule's information collection requirements and on the associated estimates of PRA burden. *See* 84 Fed. Reg. 10,072 (March 19, 2019). The Commission received no comments during the public comment period. Pursuant to the OMB regulations that implement the PRA (5 C.F.R. Part 1320), the FTC is providing a second opportunity for public comment while seeking OMB approval to extend the existing paperwork clearance for the Rule.

(9) Payments and Gifts to Respondents

Not applicable. The Rule contains no provisions for payments or gifts to respondents.

(10)-(11) Assurances of Confidentiality/Matters of a Sensitive Nature

To the extent that the Commission collects information for law enforcement purposes under the Rule's recordkeeping provisions, the confidentiality measures of Section 21 of the FTC Act, 15 U.S.C. § 57b-2, will apply.

(12) Estimated Burden/Associated Labor Costs

Estimated total annual hours burden: 2,692,350 hours

In its 2016 PRA-related Federal Register Notices² and corresponding submission to OMB, FTC staff estimated that established companies each spend an average of 50 hours per

² 81 FR 2860 (Jan. 19, 2016); 81 FR 21549 (Apr. 12, 2016).

year on compliance with the Rule, and that new industry entrants spend an average of 230 hours (an industry estimate) for compliance measures associated with start-up.³ Thus, the total estimated hours burden was calculated by multiplying the estimated number of established companies x 50 hours, multiplying the estimated number of new entrants x 230 hours, and adding the two products.

No substantive provisions in the Rule have been amended or changed since staff's 2016 submission to OMB. Thus, the Rule's disclosure requirements remain the same. Moreover, the Commission received no public comments regarding the above-noted estimates; thus, staff will apply them to the current PRA burden analysis.

Since the prior submission to OMB, however, the number of businesses engaged in the sale of merchandise subject to the MITOR has increased. The most currently available data from the U.S. Census Bureau indicates that, between 2005 and 2016, the number of businesses subject to the MITOR grew from 15,924 to 37,206, or an average increase of 1,935 new businesses a year $[(37,206 \text{ businesses in } 2016 - 15,924 \text{ businesses in } 2005) \div 11 \text{ years}]$.⁴ Assuming this growth rate continues in 2019 through 2022, the average number of established businesses during the three-year period for which OMB clearance is sought for the Rule would be 44,946:⁵

Year:	Established Businesses	New Entrants
2019-20	43,011	1,935
2020-21	44,946	1,935

³ Most of the estimated start-up time relates to the development and installation of computer systems geared to more efficiently handle customer orders.

⁴ Conceptually, this might understate the number of new entrants. Given the virtually unlimited diversity of retail establishments, it is very unlikely that there is a reliable external measure; nonetheless, as in the past, the Commission invited public comment that might better inform these estimates. For example, many online marketplace sellers that use Amazon.com's marketplace to sell to customers have agreements that provide that Amazon handles packaging and shipping the products to customers. Whether Amazon.com is also the entity responsible for sending customers delay notices when necessary could affect which entity is subject to MITOR disclosure requirements, Amazon or the individual marketplace seller.

⁵ As noted above, the existing OMB clearance for the Rule expires on May 31, 2019, and the FTC is seeking to extend the clearance for three years.

2021-22	46,881	1,935
Average:	44,946	1,935

In an average year during the three-year OMB clearance period, staff estimates that established businesses and new entrants will devote 2,692,350 hours to comply with the MITOR [(44,946 established businesses x 50 hours) + (1,935 new entrants x 230 hours) = 2,692,350]. The estimated PRA burden per seller to comply with the MITOR is likely overstated because much of the estimated time burden for disclosure-related compliance would arguably be incurred even absent the Rule. Over the years, industry trade associations and individual witnesses have consistently taken the position that providing buyers with notice about the status of their orders fosters buyer loyalty and encourages repeat purchases, which are important to marketers' success. In recent years, the demands of the Internet's online marketplace and its leading retailers such as Amazon.com, Walmart.com, and Ebay.com have driven many businesses to upgrade the information management systems to track and ship orders more effectively.⁶ These upgrades were primarily prompted by the industry's need to deal with growing buyer demand for merchandise that is timely shipped. Accordingly, most companies now provide updated order information of the kind required by the Rule in their ordinary course of business to meet buyer expectations regarding timely shipment, notification of delay, and prompt and full refunds.⁷

Estimated labor costs: \$66,501,045

FTC staff derived labor costs by applying appropriate hourly cost figures to the burden hours described above. According to the most recent data available from the Bureau of Labor and Statistics,⁸ the mean hourly income for workers in sales and related occupations was \$24.70/hour. The bulk of the burden of complying with the MITOR is borne by clerical personnel along with assistance from sales personnel. Staff believes that the mean hourly income for workers in sales and related occupations is an appropriate measure of a direct marketer's average labor cost to comply with the Rule. Thus, the total annual labor cost to new and established businesses for MITOR compliance during the three-year period for which OMB

⁶ Brian Baskin, "Amazon's Free Shipping Pushes Small Retailers, Delivery Firms to Compete," The Wall Street Journal, Apr. 8, 2017, available at <https://www.wsj.com/articles/amazons-free-shipping-pushessmall-retailers-delivery-firms-to-compete-1491649203>.

⁷ Under the OMB regulation implementing the PRA, burden is defined to exclude any effort that would be expended regardless of any regulatory requirement. 5 CFR § 1320.3(b)(2).

⁸ See Table 1, National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2018, at <https://www.bls.gov/news.release/ocwage.t01.htm>.

approval is sought would be approximately \$66,501,045 (2,692,350 hours x \$24.70/hour). Relative to direct industry sales, this total is negligible.⁹

(13) Capital and Other Non-labor Costs

Estimated annual non-labor cost burden: \$0 or minimal

The applicable requirements impose minimal start-up costs, as businesses subject to the Rule generally have or obtain necessary equipment for other business purposes, i.e., inventory and order management, and customer relations. For the same reason, staff anticipates printing and copying costs to be minimal, especially given that mail, Internet, and telephone order merchants have increasingly turned to electronic communications to notify consumers of delay and to provide cancellation options. Staff believes that the above requirements necessitate ongoing, regular training so that covered entities stay current and have a clear understanding of federal mandates, but that this would be a small portion of, and subsumed within, the ordinary training that employees receive apart from that associated with the information collected under the Rule.

(14) Estimated Cost to the Federal Government

The estimated yearly cost to the Federal Government resulting from MITOR enforcement activities, including benefits and overhead costs, is \$270,000, which is based on the assumption that the Rule's enforcement will entail one full attorney/economist work-year (\$175,000), clerical and other support services (\$75,000), and overhead costs (\$20,000).

(15) Program Changes/Adjustments

The slight increase in annual burden hours [from 1,953,840 (2016) up to 2,692,350 in 2019] is an adjustment accounting for more estimated established businesses (33,267 in 2016 and 44,946 in 2019). Also, the annual labor costs go from \$44,879,705 (2016) up to \$66,501,045 in 2019, in part because the hourly rate is slightly higher (\$22.97/hour in 2016 and \$24.70/hour in 2019) and in part because the annual hours are slightly higher because there are more estimated established businesses.

⁹ Considering that sales for "electronic shopping and mail order houses" grew from \$295 billion in 2011 to \$434 billion in 2015 (according to "Estimated Annual U.S. Retail Trade Sales – Total and E-commerce: 1998-2015," available at <https://www.census.gov/data/tables/2015/econ/arts/annual-report.html>), staff estimates the annual mail, Internet, or telephone sales to consumers in the three-year period for which OMB clearance is sought will average \$607 billion. Thus, the projected average labor cost for MITOR compliance by existing and new businesses for that period would amount to 0.01% of sales.

(16) **Statistical Use of Information**

There are no plans to publish for statistical use any information required by the Rule.

(17) **Display of the Expiration Date for OMB Approval**

Not applicable.

(18) **Exceptions to the “Certification for Paperwork Reduction Act Submissions”**

Not applicable.